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Vance K. Hill

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order to ensure more successful prosecutions in the courts of North Dakota

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From the foregoing discussion, it is our considered opinion that North Dakota has taken a very commendable step in the direction of clearing its highways of the menace of drunken driving. Through the adoption of a statute which implies consent to submit to a chemical test, the conviction rate should increase and the accident-due-to-alcohol rate should decrease. For those who drive after taking 'one more for the road,' many will find that it will no longer be too difficult to prove beyond a reasonable doubt that they were, in fact as well as law, inebriated. This, because the statute provides for the obtaining of definite evidence as to the state of intoxication in advance — unhindered by the usual obstacles of belligerent motorists and frustrating public policy. More specifically, the statute provides for the elimination of guesswork from the prosecution of driving while under the influence of intoxicating liquor cases; it protects innocent victims, for the tests may exonerate as well as convict; and, most significantly, it helps eliminate the drunk driver — Public Enemy No. 1 — from North Dakota's streets and highways.

FREDRICK R. ALM III
RANDOLPH E. STEFANSON.

GROUND WATER: WHAT IS THE LAW IN NORTH DAKOTA?

I. INTRODUCTION

Most of the seventeen states west of a line drawn from North Dakota to Texas have had or are having problems dealing with groundwater law. This becomes increasingly significant now because of the increasing shortage of water faced by these states.[1] The question usually presented is whether a legislature can validly change the law on the subject because in so doing they might be depriving some of their citizens of vested rights. This question brings forth the question of what is a vested right. This situation is further complicated in North Dakota because of two apparently conflicting statutes. Statute 47-01-13 declares the overlying land-

1. See Hutchins, *Trends in the Statutory Law of Ground Water in the Western States*, 34 Texas L. Rev. 157, 182 (1955).

owner owns all ground water not forming a definite stream. Statute 61-01-01 contends that *all* waters in the state belong to the public. There apparently have been no decisions of the North Dakota Supreme Court defining or relating to rights to ground waters. However, a 1960 decision on ground water from the Fifth Judicial District will be discussed *infra.*

Subterranean waters are usually divided into two principal classes, namely: (1) underground streams, and (2) waters which ooze, seep, or percolate through the earth, generally known as percolating waters.[2] It is well settled that subterranean waters will be presumed to be of the percolating vaiety,[3] and the party alleging the water to be an underground stream has the burden of proving it.[4] However, this historical legal distinction between the two varieties of ground water appears to have little basis in fact, as geologists and hydrologists have sharply criticized beliefs that underground water exists similar to a natural stream or waterway flowing on the surface.[5] Ground water statutes of some western states make no such distinction, but others, including North Dakota,[6] still include the historical legal distinction.[7]

II. DOCTRINES FOLLOWED BY WESTERN STATES

There are several doctrines that are applied to underground water. One is the English or common-law rule of absolute ownership of percolating waters by the overlying landowner. The result of extreme application of this rule is that a landowner may exhaust all of the common supply for a legitimate purpose without liability regardless of the length of time his neighbors had been using the water beneficially. North Dakota is one of the few states that adopted the doctrine of absolute ownership by statute.[8] However, Oklahoma, nothwithstanding such a statutory declaration, modified the absolute ownership rule by a court decision.[9] The court held in that case that despite the language of the statute the landowner

2. 56 Am. Jur, *Waters* § 102 (1947).
3. 93 C.J.S. Am. *Waters* § 87 (1956).
4. 56 Am. Jur. *Waters* § 103 (1947).
5. See, *e. g.*, Thompson and Fieldler, *Some Problems Relating to Legal Control of Use of Ground Waters,* American Waterworks Association Journal, Vol. 30, No. 7, p. 1061 (1938); Foley, *Water and the Laws of Nature,* 5 Kan. L. Rev. 492 (1957).
6. N.D. Cent. Code § 61-01-01 subsection 2 reads as follows: Waters under the surface of the earth whether such waters flow in defined subterrenean channels or are diffused percolating underground waters; and N.D. Cent. Code § 47-01-13 reads: The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream formed by nature over or under the surface may be used by him as long as it remains there. . . .
7. Hutchins, *Western Water Rights Doctrines and Their Development in Kansas,* 5 Kan. L. Rev. 533, 534 (1957).
8. N.D. Cent. Code § 47-01-13.
9. Canada v. Shawnee, 179 Okla. 53, 64 P.2d 694 (1936).

could have no greater right in the percolating water than a right of reasonable use.

This absolute ownership rule was originally accepted by decision or dictum in nearly all the western states.[10] But no western supreme court which has been called upon repeatedly to decide controversies between landowners over a common supply of ground water has continued to adhere to this doctrine.[11]

Another doctrine is the American or reasonable use rule. This rule means that the landowner's right to abstract water is not unlimited or absolute. It is subject to a reasonable use *in connection with the land from which the water is withdrawn,* qualified by the rights of other landowners having similar rights. Another form of the reasonable use rule is the California doctrine of correlative rights. Under the correlative doctrine owners of overlying lands have equal rights to the ground water supply for use on such lands, and each is entitled to an equitable apportionment if the supply is not enough for all. This rule, as developed by subsequent decisions, was instigated by the landmark case of *Katz* v. *Walkinshaw,*[12] which abrogated the common law rule in California. Also, under this rule, any surplus above reasonable requirements of landowners may be appropriated for nonoverlying use.[13]

In California percolating waters tributary to streams are subject to correlative rights on the part of both owners of overying lands and owners of land riparian to the streams. The surface stream and ground waters supplying it or dependent upon it are treated as a common supply for all who have rights to portions of the supply.[14] Thus, rights to surface and ground waters in California are coordinated on a basis of a reasonable and beneficial use.

Another doctrine, now adopted by statute in twelve of the seventeen western states, is the appropriation doctrine.[15] This doctrine follows the theory that he who makes his diversion prior in time is prior in right. In Idaho, a state with a ground water appropriation statute, it was held that waters may be appropriated either by the

10. Htuchins, *Selected Problems in the Water Law of the West,* Misc. Pub. No. 418 U.S. Dept. of Agriculture p. 156 (1942).
11. *Id.* at 158.
12. 141 Cal. 116, 70 Pac. 663 (1902).
13. Pasadena v. Alhambra, 33 Cal.2d 908, 207 P.2d 17 (1949).
14. Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 81 P.2d 533 (1938); Peabody v. Vallejo, 2 Cal.2d 351, 40 P.2d 486 (1935); Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748 (1909).
15. Hutchins, *Ground Water Legislation,* 30 Rocky Mt. L. Rev. 416, 419 (1958). These are Colorado, Idaho, Kansas, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. In Arizona and Texas statutory restrictions are not based on priority of appropriation. The article further states California, Montana, and Nebraska have made small beginnings in the field of ground water law.

statutory permit method or by diversion and application to beneficial use; and either method would give the appropriator priority over subsequent appropriations.[16]

In the evolution of principles governing rights to the use of ground waters, the general progression has been from the English rule to the American and correlative rights rules and then to the doctrine of prior appropriation. The trend to appropriation statutes for ground water has taken place during the last two decades. However, the four states with the largest acreages irrigated do not completely conform: Texas recognizes the English doctrine; Arizona and Nebraska the rule of reasonable use; California the correlative rights doctrine.[17]

Probably the earliest legislation in the western states pertaining to ground water was the statute enacted in 1866 by the Territory of Dakota.[18] This statute, declaring the overlying owner owned the percolating water, was incorporated in the laws of the states of North and South Dakota, when they were formed out of the original territory. In a 1932 decision the South Dakota Supreme Court said that, in view of two previous cases in which its decisions had been based upon the statute as well as "the law generally," there could be no serious contention over the principle that the owner of the soil is the absolute owner of the percolating water therein.[19] The South Dakota court also decided that riparian rights accrued at the time of settlement on public lands[20] and dedication of waters to the public in the water code did not affect existing riparian rights.[21]

Comparatively little litigation over the use of water has reached the Supreme Court of North Dakota. Cases that have been decided by the North Dakota Supreme Court have all adhered to the riparian doctrine without any substantial limitations. Riparian rights were first recognized in the Dakotas by the United States Supreme Court decision of *Stur* v. *Beck*.[22] It was held in *Bigelow* v. *Draper*[23] that the common law doctrine or riparian rights was in force in the Territory of Dakotas at the time of the adoption of the state con-

16. Silkey v. Tiegs, 51 Idaho 344, 5 P.2d 1049 (1931).
17. See Hutchins, *Trends in the Statutory Law of Ground Water in the Western States*, 34 Texas L. Rev. 157, 188-90 (1955).
18. Terr. Dak. Civ. Code § 255.
19. Madison v. Rapid City, 61 S.D. 83, 246 N.W. 283 (1932); Deadwood Central R.R. v. Barker, 14 S.D. 558, 86 N.W. 619 (1901); Metcalf v. Nelson, 8 S.D. 87, 65 N.W. 911 (1895).
20. Redwater Land & Canal Co. v. Reed, 26 S.D. 466, 128 N.W. 702 (1910); Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S.D. 519, 91 N.W. 352 (1902).
21. St. Germain Irrigating Ditch Co. v. Hawthorne Ditch Co., 32 S.D. 260, 143 N.W. 124 (1913).
22. 133 U.S. 541 (1890).
23. 6 N.D. 152, 69 N.W. 570 (1896).

stitution and such rights were under the protection of the Fourteenth Amendment to the Federal Constitution and therefore could not be divested by the state constitution. The North Dakota court adhered to the riparian doctrine as late as 1940.[24]

However, in 1955, both of the Dakotas took legislative action limiting the riparian doctrine. The North Dakota Legislature specifically made ground water subject to appropriation and also declared that "the several and reciprocal rights of a riparian owner, other than a municipal corporation, in the waters of the state comprise the ordinary or natural use of water for domestic and stock-watering purposes."[25] South Dakota repealed its absolute ownership statute in 1955,[26] but North Dakota did not. Could failure to repeal 47-01-13 have been a legislative oversight? It is questionable what effect this will have on the law in North Dakota. The supreme court of neither state has had occasion to pass on the 1955 legislation.

Thus, at the present, it appears North Dakota is, by statute, an appropriation state and an absolute ownership theory state with respect to ground waters. Obviously the court must do some difficult interpreting or the legislaure must change the law because the statutes appears to be conflicting.

III. 1960 NORTH DAKOTA DISTRICT COURT CASE

In the 1960 decision in the Fifth Judicial District Judge Eugene Burdick said the rule he believes to be applicable in North Dakota is that of prior appropriation.[27] In this case the plaintiff drilled a well on a tract of land he owned in 1918 which flowed sixty to seventy gallons per minute, and this well was used continuously by the plaintiff on his farm until the time of interference. The defendant city of Crosby drilled a water well on a neighboring tract conveyed to them by the Great Northern Railway Company. The railroad had received the land from Volkman in 1907. The effect of the pumping of the Crosby well impaired the underground pressure of the plaintiff's well. The question decided by the court was whether the City of Crosby, having applied for and received a water right from the State Engineer, can lawfully produce its well with impunity. The decision was that the city could not produce its well so as to injuriously affect the plaintiff as a prior appropriator of water from the same reservior. And, inasmuch as the city had the power

24. Johnson v. Armour & Co., 69 N.D. 769, 291 N.W. 113 (1940).
25. N.D. Laws 1955, c. 345. This is incorporated in the Century Code in §§ 61-01-01, 01(1).
26. S.D. Laws 1955, ch. 430.
27. Volkmann v. City of Crosby, Civil No. 3199, 5th D. N.D., April 29, 1960.

of eminent domain, the court said that the city would be required to respond in damages.

The judge said that it may be suggested that 61-01-01 pretends to declare the public ownership of the waters involved in this action. He then stated that such a contention would render the statute in direct conflict with 47-01-13. He said if 61-01-01 were given such a construction, constitutional doubts would arise as to the taking of waters to which the plaintiff is the owner. Judge Burdick stated, "61-01-01 must be construed as granting to the applicant the right to appropriate waters not otherwise appropriated. In other words, the right of appropriation cannot be exercised in a manner that will interfere with waters that have been appropriated lawfully by private owners."

The judge in this district court case also mentioned that the Receiver's Receipt was issued to Volkman, the entryman, February 28, 1905. He said his vested rights must be determined as of that date although the patent was issued to him some time later. And section 61-01-01 was first enacted March 1, 1905 and this section could not be construed to impair rights that were vested prior to that date. Also, Volkman's right to the use of underground water was vested by virtue of 47-01-13 which was first enacted in 1877.

Thus, it appears that if Volkman's Receiver's Receipt had been issued subsequent to March 1, 1905, his cause of action would have been thwarted, since his use would not have been perfected by 61-04-22.[28] The judge is evidently saying that a person does not have to use his rights to have them become vested if he obtained a Receiver's Receipt prior to March 1, 1905. Consequently it appears the result would have been the same in this case even if Crosby's use was prior to that of the plaintiff's Thus the 1905 law, now 61-01-01, applies only to water on lands in the public domain at the time of enactment of the statute.

IV. DECISIONS ON MODERN LEGISLATION

The leading case on modern groundwater legislation appears to be a Kansas case, *Baumann* v. *Smhra*,[29] decided in 1956 by the federal district court and affirmed by the United States Supreme Court.[30] Plaintiff in this action claimed the Kansas water appropri-

28. N.D. Cent. Code § 61-04-22. Prescripive water right.—Any person, firm, corporation or municipality which used or attempted to appropriate water from any watercourse, stream, body of water or from an underground source for mining, irrigating, manufacturing or other beneficial use over a period of twenty years prior to January 1, 1934, shall be deemed to have acquired a right to the use of such water without having filed or prosecuted an application to acquire a right of the beneficial use of such waters. . . .

29. 145 F. Supp. 617 (D.C. Kan. 1956).

30. 352 U.S. 863 (1956).

ation act violated the Fourteenth Amendment. The court said it has long been settled that a state may modify or reject the riparian doctrine and adopt the appropriation system, but in so doing it must recognize valid and existing vested rights.[31] Then the federal tribunal declared, *"We do not regard a landowner as having a vested right in underground waters underlying his land which he has not appropriated and applied to beneficial use."*[32]

The court also said that even though prior decisions of a state court have established a rule of property, a departure therefrom in a subsequent decision does not, without more, constitute a deprivation of property without due process.[33] There is no vested right in the decisions of a court. They went on to say it is well settled that a legislature may change the principle of the common law and abrogate decisions made thereunder when it is in the public interest.[34]

Another Kansas case, dealing with surface waters, earlier upheld the constitutionality of the Kansas appropriation statutes.[35] They said here that earlier decisions had been approached on the basis of individual interest alone. Now they thought it necessary to take a broader view of the situation and weigh more heavily the public welfare. The state's highest tribunal claimed unused or unusable rights predicated alone upon theory become of little if any importance. The court in this case also felt that broad general statements in earlier decisions must be disregarded or modified to harmonize with the will of the legislature..

VANCE K. HILL.

RAILROAD, GRANTS, AND CONDEMNATION

Title and Interest Acquired in Railroad Rights-of-Way

I. HISTORY

The concept of land subsidies for the development of the vast areas of the West was promulgated before the Constitution of the

31. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899); Williams v. City of Wichita, Kansas, 279 F.2d 375, 377 (1960).

32. Baumann v. Smhra at 624. For a discussion of the troublesome question of unused overlying rights, see Kirkwood, *Appropriation of Percolating Water*, 1 Stan. L. Rev. 1 (1948). Dean Kirkwood believes that limiting vested rights to those actually used is legally sound. But see, Peabody v. Vallejo, 2 Cal.2d 351, 40 P.2d 486 (1935); San Bernadino v. Riverside, 186 Cal. 7, 198 Pac. 784 (1921); Burr v. Maclay Rancho Water Co., 154 Cal. 428, 98 Pac. 260 (1908).

33. O'Neil v. Northern Colorado Irrigation Co., 242 U.S. 20, 26, 27 (1916).

34. Silver v. Silver, 280 U.S. 117, 122 (1929); United States v. United Shoe Machinery Co., 264 F. 138, 151 (8th Cir. 1920).

35. State v. Knapp, 165 Kan. 546, 207 P.2d 440 (1949).

36. *Id.* at 447.

37. *Ibid.*